IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 123 of 2005
With
CIVIL APPLICATION No.5890 of 2005
In
SECOND APPEAL No. 123 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DINESHKUMAR BHANUSHANKER VYAS & 18 - Appellant(s)
Versus
MUNICIPAL CORPORATION OF THE CITY OF RAJKOT & 4 - Defendant(s)

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Appearance :
MR VIMAL M PATEL for Appellant(s) : 1 - 19.

MR RM CHHAYA for Defendant(s) : 1,
None for Defendant(s) : 2 - 5.
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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 30/08/2006

ORAL JUDGMENT

1. The appeal is admitted for hearing on the following substantial questions of law;

(i) Whether the suit is barred under sec.105 of the Town Planning and Urban Development Act, 1976?

(ii) Whether the suit is bad for want of notice to the Rajkot Municipal Corporation under sec.487 of the Bombay Provincial and Municipal Corporation Act, 1949?

(iii) Whether the learned trial court was justified in taking up the above questions as preliminary issue?

2. With the consent of the parties, the matter is finally heard.

3. The plaintiffs / appellants who are 19 in number, filed a

suit being Regular Civil Suit No.21 of 1991 challenging the Town Planning Scheme No.3 (Rajkot) submitting inter-alia that by framing the scheme, they were being discriminated, their constructions / shops were to be demolished in road widening scheme and this was a lopsided action to protect some others. It was submitted that the constructions of the plaintiffs which are on the Northern side of the main road are sought to be demolished, while other houses / constructions are still to stand. The defendant appeared before the learned trial court and raised every possible contentions to contest the suit. It was submitted that the suit was bad and not maintainable in view of sec.105 of the Town Planning and Urban Development Act, 1976 and the plaintiffs could not maintain any suit in absence of a legal notice to Rajkot Municipal Corporation as required under sec.487 of B.P.M.C. Act, 1949. The learned trial court vide its order dtd.25/10/1996 while allowing the application filed by the defendants, ordered that the question of maintainability of the suit and notice under sec.487 of B.P.M.C. Act, 1949 would be taken to be the preliminary issue.

4. The parties were thereafter heard. The learned trial court after hearing the parties observed that in absence of positive, cogent and clinching evidence, the suit could not be held to be maintainable and the allegation of malafide in absence of concrete proof could not hold the field. The trial court also observed that the allegation of malafide regarding fixation of the road width and boundaries was per-se baseless and without any cogent material. In relation to sec.487 of B.P.M.C.Act, 1949, the learned trial court observed that the suit was not maintainable in absence of a notice to Rajkot Municipal Corporation because the action in relation to the Town Planning was an action under the B.P.M.C. Act, 1949. It accordingly held that the suit was not maintainable. Being aggrieved by the said order, the appellants preferred an appeal and as the appeal proved futile, they are before this Court.

5. Learned counsel for the appellants submits that in accordance with the Order 14 Rule 2 of the Code of Civil Procedure, an issue can be decided as preliminary issue but it can not be so decided if evidence is to be brought on the record subsequent to framing of the issue, or, the

plaint can be rejected under Order 7 Rule 11 or the suit on the allegations made in the plaint itself, is not maintainable. According to him, on one side, the court treated the issue as preliminary issue and on the other hand recorded finding against the interest of the plaintiffs that no evidence has been brought on record to prove the malafide. He submits that the learned trial court had put the cart before the horse and has erred in recording a finding against the interest of the plaintiff.

6. Mr.Chhaya, learned counsel for the respondents – defendant submits that the order passed by the learned courts below are absolutely justified because the findings recorded by the learned court below are to be read in their true perspective and it must be read to mean that there was no prima facie evidence to hold that the action was malafide action.

7. After hearing the parties, I must immediately record that the procedure adopted by the learned trial court was running contrary to the provisions of Rule 2 of Order 14 of the Code of Civil Procedure. Rule 2 provides that a Court shall proceed to pronounce the judgement on all

the issues simultaneously, but in case a suit or part of the relief claimed by the plaintiffs can be disposed of on a legal issue which is not depending on a fact finding inquiry, then the said issue can be disposed of by the Court as preliminary issue. In the present matter, on one side, the Court was treating the issue as preliminary issue and was also making observation on the other hand that no evidence was brought on record. If the result of the issue was depending upon a fact finding inquiry, then the issue could not be decided as preliminary issue.

8. The approach of the learned trial court is patently illegal and runs contrary to the provisions of Rule 2 Order 40.

9. On this short ground, the appeal must be allowed in favour of the appellant and the finding recorded by the learned courts below on the said issue must be set aside.

10. As I have held that the procedure adopted by the learned trial court is patently illegal, I am not required to decide question Nos.1 and 2 at this stage, because such questions / issues will have to be decided by the learned

trial court after recording complete evidence of the parties.

11. The question No.3 is answered in favour of the plaintiffs. It is held that the trial court was unjustified in dismissing the suit.

12. The matter is remanded to the learned trial court for its trial in accordance with law. The learned trial court shall give appropriate opportunity to the parties to lead evidence, oral and documentary. It shall provide an appropriate opportunity of hearing to the parties and shall decide the matter in accordance with law.

13. The suit has been filed in the year 1991 and the road could not be widened because of the present suit and a part of the scheme is still in lurch. In case the suit is decreed, then the scheme would be required to be modified and in case the suit is dismissed, the scheme is to be implemented. Under the circumstances, I direct the learned trial court to dispose of the suit finally within six months from the date of appearance of the parties.

14. It is made clear that the trial court shall not grant any adjournment to the parties and if required it shall proceed with the hearing of the matter day-to-day.

15. The parties shall appear before the learned trial court on 22/9/2006.

16. Let a copy of this judgement be sent by the Registry to the learned trial court so that the learned trial court can understand as to what it has to do.

17. Let a decree be framed accordingly.

18. The interim relief granted in Civil Application No.5890 of 2005 in favour of the plaintiffs shall continue till final disposal of the suit. In view of the disposal of the appeal and continuation of the interim relief in favour of the plaintiffs / appellants, no further orders are needed on Civil Application No.5890 of 2005 which accordingly stands disposed of.

19. Record and Proceedings which were called for from the learned courts below be immediately sent back.

(R.S.GARG,J.)

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